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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 503

HERRIN TRANSPORTATION CO., INC., MOBILE EXPRESS, INC., AND ROBERT T. HERRIN,

Appellants,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA

STATEMENT AS TO JURISDICTION

Filed October 17, 1952

In compliance with the rules of the Supreme Court of the United States, plaintiffs, Herrin Transportation Co., Inc., Mobile Express, Inc., and Robert T. Herrin, submit herewith their statement, particularly disclosing the basis upon which the Supreme Court of the United States has jurisdiction on appeal to review the final judgment of the District Court entered in this cause on September 17, 1952.

Statutory Provisions Sustaining Jurisdiction

The jurisdiction of the Supreme Court of the United States to review by direct appeal the judgment and decree complained of is conferred by 28 U. S. Code Sections 1253 and 2101 (b), relating to direct appeals from decisions of three-judge courts in suits to set aside in whole or in part orders of the Interstate Commerce Commission. The following decisions, among others, sustain the jurisdiction of the Supreme Court of the United States to review the judgment and decree on direct appeal in this case:

United States v. *Lowden,* 308 U. S. 225, 60 S. Ct. 248, 84 L. Ed. 208;

Interstate Commerce Commission v. *Railway Labor Executives' Assn.,* 315 U. S. 373, 62 S. Ct. 717, 86 L. Ed. 904.

Suit was brought in this case under the provisions of Title 28, U. S. C. A., Sections 1336, 1398, 2284 and 2321-2325; Title 49, U. S. C. A., Sections 17(9) and 305(g); and Title 5, U. S. C. A., Sections 1001-1009.

Statute Involved

The statute involved is the Interstate Commerce Act.

Transfer of the existing certificates of public convenience and necessity from the present owner, Mobile Express, Inc., to Herrin Transportation Company (Robert T. Herrin, control) is sought under the provisions of Section 5 (2) (a) of said act (49 U. S. C. A., Section 5 (2) (a)), which provides in part as follows:

> "It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b)—
>
> (i) for any carrier * * * to purchase * * * the properties, or any part thereof, of another, * * *"

Section 5 (2) (b) provides in part:

> "Whenever a transaction is proposed under subparagraph (a), the carrier or carriers or person seeking authority therefor shall present an application to the Commission, * * *. If the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed transaction is within the scope of subparagraph (a) and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction, upon the terms and conditions, and with the modifications, so found to be just and reasonable.

and Section 5 (2) (c) provides as follows:

> "In passing upon any proposed transaction under the provisions of this paragraph (2), the Commission shall give weight to the following considerations, among others: (1) The effect of the proposed transaction upon adequate transportation service to the public; (2) the effect upon the public interest of the inclusion, or failure to include, other railroads in the territory involved in the proposed transaction; (3) the total fixed charges resulting from the proposed transaction, and (4) the interest of the carrier employees affected."

Another provision of the Act is likewise involved, namely, Section 312(a), Title 49 U. S. C. A., which states in part that,

> "Certificates, permits and licenses shall be effective from the date specified therein, and shall remain in effect until suspended or terminated as herein provided."

Reference is also made to Title 49, U. S. C. A., Sections 306 and 307, referring to the proof required before certificates are issued by the Commission, and which makes no

reference to a requirement that public convenience and necessity be proved in a case (as here) involving only the *transfer* of existing certificates and operating rights.

Statement of the Case

By application filed April 1, 1949, Herrin Transportation Company of Houston, Texas (Robert T. Herrin, intervenor, owner of 87.2% of the outstanding capital stock thereof), sought authority under the Interstate Commerce Act (Section 5 (2) supra) to purchase all of the motor carrier operating rights heretofore issued by the Interstate Commerce Commission to Mobile Express, Inc., New Orleans, Louisiana. The certificates generally authorized common carrier motor carrier operations of general commodities between New Orleans, Louisiana and Mobile, Alabama, with certain described off-route and intermediate points.

The certificates involved here had heretofore, with the approval of the Interstate Commerce Commission, been leased by Mobile Express, Inc. to one Bobo who ceased operations on or about March 10, 1948 and filed a voluntary petition in bankruptcy on March 15, 1948.

On March 29, 1948 Mobile Express, Inc. filed a petition with the Interstate Commerce Commission, requesting that it revert the leased operating rights from Bobo to it. Despite the aggressive actions and policy on the part of Mobile Express, Inc. and several subsequent petitions to the Commission, it was not until March 7, 1949 that the parties were served with an order reverting the operating rights from Bobo to Mobile Express, Inc.

Contemporaneously with the application for permanent authority to transfer, the parties likewise filed on March 21, 1949 an application for temporary authority (pending the application for permanent authority) to lease the oper-

ating rights under the provisions of Section 210 a(b) (49 U. S. C. A.). The application was denied by the Commission, which found that the failure to grant the authority would not result in destruction or injury to the motor carrier properties sought to be acquired or interfere substantially with their future usefulness. By failing to grant the temporary authority application, the Commission misinterpreted the provisions of Title 49 U. S. C. A., Section 310 a (a) and (b). We cite herewith the applicable provisions thereof:

> "(a) To enable the provisions of service for which there is an immediate and urgent need to a point or points or within a territory having no carrier service capable of meeting such need, the Commission may, in its discretion and without hearings or other proceedings, grant temporary authority for such service by a common carrier or a contract carrier by motor vehicle, as the case may be. Such temporary authority, unless suspended or revoked for good cause, shall be valid for such time as the Commission shall specify, but for not more than an aggregate of one hundred and eighty days, and shall create no presumption that corresponding permanent authority will be granted thereafter.
>
> "(b) Pending the determination of an application filed with the Commission for approval of a consolidation or merger of the properties of two or more motor carriers, or of a purchase, lease, or contract to operate the properties of one or more motor carriers, the Commission may, in its discretion, and without hearings or other proceedings, grant temporary approval, for a period not exceeding one hundred and eighty days, of the operation of the motor carrier properties sought to be acquired by the person proposing in such pending application to acquire such properties, *if it shall appear that failure to grant such temporary approval may result in destruction of or injury to such motor carrier properties sought to be acquired, or to interfere substantially with their future usefulness in the perform-*

ance of adequate and continuous service to the public." (Emphasis ours.)

Thereafter, two separate hearings on the permanent application to transfer were held before trial examiners of the Commission, numerous public witnesses were produced by applicants, and each examiner in turn recommended denial of the applications. Exceptions having been filed on March 27, 1951, *Division 4 of the Interstate Commerce Commission approved and authorized the purchase and transfer of the certificate, holding that the transaction would be consistent with the public interest.*

Petition for reconsideration to the entire Commission was filed, which reversed its own Division 4 opinion in a 6 to 4 decision of the Commission denying the application to transfer, (Commissioners Lee, Mahaffie, Rogers and Cross dissenting).

It was from this action that appeal was taken (under the provisions of law heretofore referred to) to the three-judge district court. The district court having affirmed the Interstate Commerce Commission decision by judgment entered September 17, 1952, this appeal is prosecuted to the Supreme Court of the United States.

The Question Presented Is Substantial

The question presented by this appeal is substantial. Jurisdiction is conferred herein as a matter of right under the statutes heretofore cited. Nevertheless, appellants aver that there is a strong substantial issue involved and presented in this matter.

The case of *Universal Camera Corp* v. *National Labor Relations Board*, 340 U. S. 474, 71 S. Ct. 456, is the latest expression of the Supreme Court on the question of the scope of judicial review of an administrative decision. It

has been wrongly applied by the three-judge District Court herein, which has in effect abdicated the judicial function and held that the issue involved is an administrative question peculiarly within the province of the Commission to decide and *that the Court may not substitute its judgment for that of the Commission.*

Until the holding of the Supreme Court in the *Universal Camera* case, *supra*, it might have been inferred that this is true. But it is no longer so, and the Court has strongly stated that it must exercise its independent judgment of the whole record to determine the substantiality of evidence supporting a Labor Board decision. With equal force the decision should be applicable to the Interstate Commerce Commission, another administrative tribunal created by Congress.

By failing to exercise its prerogative, the District Court did not even consider the proposition that the certificates involved in this case are still outstanding, valid certificates issued by the Interstate Commerce Commission, and that there is no authority in the Interstate Commerce Act authorizing the Commission to decline transfer because of so-called "dormancy." Likewise, there has been no determination by the District Court of the proposition so clearly established, beyond successful contradiction, that the cessation of operations and failure to resume operations *has been due to the Commission's action in holding up this case for more than a year* before it reverted the certificates from lessee, Bobo, to lessor, Mobile Express, Inc., and *then failing*, under the provisions of the Interstate Commerce Act, *to authorize temporary operations* pending a determination of the permanent authority case *so that there would be no destruction or impairment of future usefulness* of the sole motor carrier property of Mobile Express, Inc., namely, its certificates of public convenience and necessity.

Further, the District Court completely failed to discuss the proposition of law that the Interstate Commerce Commission is wholly without authority to require proof of public convenience and necessity by public witnesses, such as was required in this case, in connection with a mere transfer-of-certificates case, the transfer being of certificates already issued and still outstanding, and the Commission's decision having been based to some substantial extent upon the alleged failure of applicants to prove public convenience and necessity by the public witnesses.

No consideration has been given by the Court to the fact that Division 4 of the Interstate Commerce Commission, the Division to which transfer cases are assigned for handling, resolved this case in favor of plaintiffs, or that the reversal of the Commission's own Division 4 in a 6 to 4 decision, which is somewhat unprecedented, shows how the Commission vacillated in this case and that it undoubtedly realizes it has been standing on tenuous ground.

Plaintiffs have no recourse in the face of this grossly prejudicial and capricious action but to appeal to the Courts. And the District Court failed here to follow the policy instituted by the Supreme Court in the *Universal Camera* case, *supra,* although it states that it reviewed the record as a whole. No consideration was given to the legal issues involved and set forth in plaintiffs' brief to the District Court. They are not even referred to for the most part in the opinion.

For the foregoing reasons it is submitted that the Court should note jurisdiction and permit oral argument because plaintiffs have a direct right of appeal by operation of law and because the questions involved on this appeal are substantial.

The judgment of the lower court should be reversed and judgment entered for plaintiffs as originally prayed for.

Respectfully submitted,

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By: (Sgd.) ROBERT A. AINSWORTH, JR.,
Trial Attorney.

APPENDIX "A"

Opinion of the Court—Filed September 15, 1952

(Number & Title Omitted)

Before: Borah, Circuit Judge; Christenberry, District Judge; Wright, District Judge

CHRISTENBERRY, *J:*

In this suit, plaintiffs seek to vacate and set aside an order of the Interstate Commerce Commission dated September 27, 1951, denying the application of the plaintiffs to transfer to Herrin Transportation Co., Inc., Robert T. Herrin party in control, certificates of public convenience and necessity theretofore issued to Mobile Express, Inc., in I. C. C. Docket Numbers MC-29906 and MC-29906-Sub. No. 1, authorizing said corporation to operate as an interstate common carrier by motor vehicle. The application of plaintiffs was filed on April 1, 1949, under Section 5 of the Interstate Commerce Act, with defendant Interstate Commerce Commission, hereinafter referred to as "The Commission", in said Commission's Docket No. MC-F-4130.

The Commission assigned the application for hearing at New Orleans, before its Examiner Philip M. Crowley, and such hearing was held on May 6, 1949. The Examiner's report and recommended order, recommending denial of the application, were issued on August 3, 1949.

Within the delays provided by law, applicants filed exceptions to the Commissioner's findings and recommended order, and, in the alternative, requested that the case be re-opened for further hearing. The alternative request for further hearing was granted by Division 4 of the Commission, and said hearing was held during several days, beginning April 11, 1950, at New Orelans, before Examiner Francis A. Clifford.

Examiners Clifford and Hobart C. Clough, after this further hearing, issued a report and recommended order recommending denial of the application. Within the legal

delays, the applicants filed exceptions to the report and order recommended by the Examiners, and on March 7, 1951, Division 4 of the Commission reversed the Examiner's report, and decided in favor of the plaintiffs, authorizing the transfer of the certificates.

Petitions for reconsideration were then filed by protesting carriers, and the matter then came before the entire Interstate Commerce Commission for decision.

On September 27, 1951, the entire Commission issued its final order, reversing the Division 4 decision, and denying the application for transfer. On November 20, 1951, plaintiff brought this suit to set aside the Commission's order.

Jurisdiction of this Court is invoked under the provisions of Title 28, U. S. C. A. §§ 1336, 1398, 2284 and 2321-25; Title 49 U. S. C. A. §§17 (7) and 305(b); and Title 5 U. S. C. A., §§ 1001-1009.

The plaintiffs charge that the Commission's order denying plaintiffs' application is illegal, because:

(1) The Commission exceeded its statutory authority.

(2) The order is based upon an improper interpretation of the Interstate Commerce Act.

(3) The order has no evidence supporting it, and is contrary to the evidence.

(4) The Commission erred in making and in failing to make certain specified findings.

Six motor carriers who were protestants in the Commission's hearings and proceedings intervened in this suit and filed their answer.

Mobile Express, Inc., hereinafter referred to as Mobile, was issued a certificate by the Interstate Commerce Commission, dated December 6, 1940, numbered MC-29906, authorizing said corporation to carry on motor freight common carrier operations in interstate commerce, transporting general commodities over U. S. Highway 90 between New Orleans, Louisiana, and Mobile, Alabama, serving all intermediate points except those in Louisiana. On September 22, 1941, the Commission extended this authority to the off-route points of Logtown, Waveland, Clermont

Harbor, Lakeshore, Kiln, Pine Hill, Fenton, DeLisle and Henderson Point, Mississippi, points within 10 miles of Mobile, and within 10 miles of New Orleans and Slidell, Louisiana, except traffic between New Orleans and Slidell. Mobile operated under these certificates until December 17, 1946, when it voluntarily ceased operating. Mobile did not operate from December 17, 1946 to April 10, 1947. On December 20, 1946, Mobile filed a request with the Commission, seeking authority to suspend its operations, which request was denied. Mobile then sought authority to lease its operating rights to one Lewis Bobo for a period of 99 years. The Commission, on April 10, 1947, approved the lease for a period of 14 years. Mobile had disposed of its equipment, and the lease to Bobo was of operating rights only. Bobo failed to pay the rental called for under the lease, and on February 24, 1948, Mobile notified him that the lease, was cancelled for non-payment of rent. On March 10, 1948, Bobo ceased operating, and no operations under Mobile's certificates have been conducted since that date. On March 15, 1948, Bobo filed a voluntary petition in Bankruptcy. On March 29, 1948, after having failed to get Bobo to sign a joint petition seeking cancellation of the lease authority, Mobile filed with the Commission a request that the lease authority be cancelled. That request was denied by the Commissioner by order dated June 25, 1948.

On July 16, 1948, Mobile, in a petition filed in the United States District Court for the Southern District of Alabama, sought an order holding that the Trustee in Bankruptcy had no further interest in the lease. That petition was denied by the Court on March 9, 1949. During the pendency of the petition in the United States District Court for the Southern District of Alabama, that is to say on December 13, 1948, Mobile filed a petition with the Commission seeking authority to suspend operations until the matter pending before the District Court could be concluded. The Commission denied that petition by order dated February 18, 1949, but changed its records to show Mobile as the holder of the operating authority.

On April 1, 1949, by joint application filed with the Commission, Herrin and Mobile sought authority under Section

5 of the Interstate Commerce Act (49 U.S.C.A. § 5), for purchase by the former of operating rights of the latter. No other party was involved. The purchase price of $13,750.00 was placed in escrow with Mobile's controlling stockholder, one Walter J. Gex, and was payable to Mobile regardless of whether the Commission approved or denied the application.

At the Commission's first hearing on the application, eight motor carriers intervened in opposition to the application, and introduced evidence. At that hearing, plaintiffs did not attempt to prove public convenience and necessity, but relied upon the existing authority. They contended that the operating authority could be sold, claiming that there was no abandonment or discontinuance of operations by Mobile that would prevent the sale. The Examiner found that there was an abandonment or discontinuance of operations. The recommendation of the Examiner that the application be denied was on the grounds as follows:

> "* * * to permit vendee to institute the service authorized by vendor's certificate in this highly competitive area would have the effect of imposing a penalty on intervenors for increasing their facilities to meet the needs of the shipping public between New Orleans and Mobile from 1946 on, and at a time when available traffic is diminishing. The Examiner is of the opinion that in the absence of a showing that there is need for the new competitive service proposed by vendee, such additional service would not foster sound economic conditions in transportation in the area involved."

In their alternative petition for further hearing, plaintiffs alleged a public convenience and necessity for the operation existed, and that they would prove such if the Commission would grant a further hearing.

At the second hearing, held by a different Examiner of the Commission, 20 shippers and consignees, and 3 of Herrin's connecting line motor carriers in Texas, testified in support of the application. The plaintiffs endeavored to establish public convenience and necessity for the additional service proposed by Herrin. Fifteen shipper witnesses

testified, some by stipulation, in support of the protestants.

In their report, recommending that the application be denied, the Examiners concluded:

> "* * * Such benefits as shippers might receive from the proposed single-line service, standing alone, are not sufficient to warrant approval of the transaction. The record shows that the revenue which the intervenors derive from handling interline shipments is essential to their operations. The diversion of a substantial amount of this traffic to vendee would no doubt impair their ability to continue their present service. The evidence adduced by shippers supporting the application indicates a preference for the proposed through service more than it shows a real need for that service. Considering all the circumstances involved we are of the opinion that the proposed transaction would not be consistent with the public interest."

Thereafter, Division 4 of the Commission in deciding in favor of plaintiffs, notwithstanding the report and recommended order of the Examiners, concluded that a need had been shown for the additional service by vendee in the territory between New Orleans and Mobile, and that the granting of the application for transfer would be consistent with the public service. Subsequently, as has been said, the entire Commission, by majority vote, denied plaintiffs' application, and in doing so gave the following reasons for its action:

> "Upon reconsideration of the evidence in the light of petitioners' contentions, we are of the opinion that the prior report gave undue weight to the desire of shippers and consignees for the proposed single-line service; that this sole consideration, in view of the existing services of numerous carriers in the territory between New Orleans and Mobile, does not warrant revival of the dormant operating rights; that no need has been shown for the additional service by vendee in that territory; and that the disadvantages which would result from approval of the transaction outweigh the possible benefits."

The question here is not whether the proposed purchase by Herrin of Mobile's operating rights is consistent with the public interest. That is an administrative question peculiarly within the province of the Commission to decide, and it is not for this Court to substitute its judgment for that of the Commission.

Section 5(2)(a) of the Interstate Commerce Act (49 U.S.C.A. § 5 (2) (a) provides in part as follows:

> "It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b)—
>
> (i) for any carrier * * * to purchase * * * the properties, or any part thereof, of another, * * *.

Section 5(2)(b) provides in part:

> "Whenever a transaction is proposed under subparagraph (a), the carrier or carriers or person seeking authority therefor shall present an application to the Commission, * * *. If the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed transaction is within the scope of subparagraph (a) and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction, upon the terms and conditions, and with the modifications, so found to be just and reasonable. * * *."

and Section 5(2)(c) provides as follows:

> "In passing upon any proposed transaction under the provisions of this paragraph (2), the Commission shall give weight to the following considerations, among others: (1) The effect of the proposed transaction upon adequate transportation service to the public; (2) the effect upon the public interest of the inclusion, or failure to include, other railroads in the territory involved in the proposed transaction; (3) the total fixed charges resulting from the proposed transaction, and (4) the interest of the carrier employees affected.

From the above quoted provisions of Section 5 of the Act, it is clear that the Commission had the statutory authority to make the order of which plaintiffs complain. This being true, the only issue remaining to be decided is whether the Commission's order has a rational basis in adequate findings which in turn are supported by substantial evidence, or whether the Commission acted arbitrarily and capriciously in disapproving the acquisition by Herrin of the operating rights of Mobile.

It is settled law that if the order of the Commission lies within the scope of the statute, and is based upon adequate findings that are supported by substantial evidence, the order is entitled to finality, and may not be set aside, modified or disturbed by this Court.

In the case of *Interstate Commerce Commission* v. *Union Pacific R. Co.*, 222 U. S. 541, in discussing the limitation upon the right of courts to review orders of the Commission, the Court said:

> "In determining these mixed questions of law and fact, the court confines itself to the ultimate question as to whether the Commission acted within its power. It will not consider the expediency or wisdom of the order, or whether, on like testimony, it would have made a similar ruling. 'The findings of the Commission are made by law prima facie true, and this court has ascribed to them the strength due to the judgments of a tribunal, appointed by law and informed by experience.' Ill. Cent. v. I.C.C., 206 U. S. 441. Its conclusion, of course, is subject to review, but when supported by evidence is accepted as final; not that its decision, involving as it does so many and such vast public interests can be supported by a mere scintilla of proof—but the courts will not examine the facts further than to determine whether there was substantial evidence to sustain the order."

In *Mississippi Valley Barge Co.* v. *U. S., et al.*, 292 U. S. 282, 54 S. Ct. 692, 695, the Court said:

> "The structure of a rate schedule calls in peculiar measure for the use of that enlightened judgment which

> the Commission by training and experience is qualified to form. Fla. v. U. S., 292 U. S. 1, 54 S. Ct. 603. It is not the province of a Court to absorb this function to itself. (Cases cited). The judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body."

It is true that those cases involved the rate-making power of the Commission, but the rule stated is equally applicable to all orders of the Commission.

In *McLean Trucking Co.* v. *U. S.*, 321 U. S. 67, 64 S. Ct. 370, an order of the Commission authorizing the consolidation of several motor carriers under Section 5(2) of the Act was approved by the Supreme Court, and the Court said:

> "* * * Resolving these considerations is a complex task which requires extensive facilities, expert judgment and considerable knowledge of the transportation industry. Congress left that task to the Commission 'to the end that the wisdom and experience of that Commission may be used not only in connection with this form of transportation, but in the coordination of all other forms'. 79 Cong. Rec. 12207. 'The wisdom and experience of that commission,' not of the courts, must determine whether the proposed consolidation is 'consistent with the public interest'. (Citing cases). If the Commission did not exceed the statutory limits within which Congress confined its discretion and its findings are adequate and supported by evidence, it is not our function to upset its order."

In this case, the Commission was required by the Statute to make two basic findings: (1) that the proposed transaction is within the scope of Section 5(2)(a) of the Statute, and (2) that the proposed transaction would or would not be consistent with the public interest. These findings were made by the Commission. To determine whether the Commission's findings are supported by substantial evidence, the record must be considered as a whole. *Universal Camera Corp* v. *National Labor Relations Board*, 340 U. S. 474, 71 S. Ct. 456. This we have done. To review the evi-

dence here in detail would serve no useful purpose. We think it is sufficient to say that from such examination it is clear that the ultimate finding that the proposed transaction would not be consistent with the public interest has a rational basis in the subsidiary findings which are supported by substantial evidence.

The Commission was confronted on the one hand with the problem of the probable effect of the proposed transaction upon existing transportation facilities, and on the other hand the question of whether there was need for the new service proposed by Herrin. Evidence was adduced by proponents and opponents of the proposed transaction, and it is plain from the record that the problem of the Commission was chiefly one of weighing evidence in the light of the national transportation policy, and of Section 5 of the Act. The weighing of the evidence is a function reposed by the Act in the Commission. It is a function particularly calling for the exercise of the wisdom, experience and expert judgment of the Commission.

The order complained of has a rational basis in the adequate findings, which findings are supported by substantial evidence, and the Commission did not act arbitrarily, capriciously, or unlawfully.

The complaint is, accordingly, dismissed, at plaintiffs' cost.

New Orleans, Louisiana, September 15, 1952.

/s/ HERBERT W. CHRISTENBERRY,
United States District Judge.

In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 503

HERRIN TRANSPORTATION CO., INC., MOBILE EXPRESS, INC., and ROBERT T. HERRIN, *Appellants,*

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.

Appeal from the United States District Court for the Eastern District of Louisiana.

MOTION TO AFFIRM

FOR THE EASTERN DISTRICT OF LOUISIANA
NEW ORLEANS DIVISION

MOTION TO AFFIRM

Appellees United States and Interstate Commerce Commission (hereinafter referred to as the Commission), pursuant to Rule 12, paragraph 3

of the Revised Rules of the Supreme Court of the United States, move that the final judgment of the District Court be affirmed.

This is a direct appeal from the final judgment, entered on September 17, 1952, of a specially constituted District Court of three judges convened pursuant to Section 2284, Title 28 of the United States Code, dismissing appellants' complaint seeking to set aside an order of the Commission dated September 27, 1951. Appeal was allowed on October 17, 1952, and appeal papers were served on October 21, 1952.

The Commission's order,[1] entered in proceedings under Section 5(2)[2] of the Interstate Commerce Act, denied the application of Herrin Transporation Co. Inc. (hereinafter referred to as Herrin), a common carrier by motor vehicle in interstate commerce, to purchase certain operating rights of another motor vehicle common carrier, Mobile Express, Inc. (hereinafter referred to as Mobile). Herrin operates over regular routes in territory extending generally between Houston on the Southwest and Memphis, Tennessee on the Northeast and between Forth Worth and Dallas, Texas, on the Northwest and New Orleans, Louisiana, on the Southeast. Mobile is authorized to operate, but is not conducting any

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[1] 58 M.C.C. 59.

[2] 49 U.S.C. 5(2). Pertinent provisions of the statute are set forth under "Stutes Involved" in the "Statement as to Jurisdiction."

operations under the rights which it proposes to sell to Herrin, over a regular route, between New Orleans and Mobile. Herrin sought to acquire those operating rights to enable it to provide direct service from Texas points to Mobile.

The Commission, in denying the transfer held (1) that the rights of Mobile were dormant, that the traffic formerly handled by Mobile had found services of other carirers who had expended their funds and energies in developing and maintaining facilities to handle all available traffic, including that formerly handled by Mobile, and that the transfer would result in the institution of a new service in competition with such carriers; (2) that there was no evidence of shipper dissatisfaction with the existing services or any inadequacy in such services between the points previously served by Mobile but, on the contrary, numerous carriers afforded an efficient service between such points and have facilities available to transport additional traffic when required, and that the preference of some shippers for single line service did not mean that existing two-line services were inadequate for such shippers needs nor offset the possible adverse effects which reinstitution of operations would have on existing carriers.[3]

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[3] Single line service consists of one carrier performing the transportation from origin to destination while two-line service consists of two carriers participating in such transportation by interchanging the traffic at an intermediate point.

The Commission accordingly concluded that the proposed transfer "would not be consistent with the public interest." 58 M.C.C. 62.[4] The District Court sustained the Commission's order in a considered opinion.

1. The Commission found that the rights of Mobile were dormant and that Herrin, if permitted to acquire such rights, would reinstitute service thereunder which, in effect, would be a new service. These findings are clearly supported by the record. As the Commission pointed out in its report, Mobile voluntarily ceased all operations between New Orleans and Mobile December 17,

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[4] After a hearing on May 6, 1949, in which ten motor carriers appeared in opposition to the transfer, the hearing examiner recommended denial of the transfer. Herrin filed exceptions to the proposed report and, in the alternative, petitioned for rehearing to show shipper support of the proposed transfer. The petition for rehearing was granted and a second hearing, beginning April 11, 1950, was held by another examiner. The second examiner also recommended that the petition be denied. By report and order, dated March 27, 1951, Division 4 approved the application. However, the intervening motor carriers petitioned for reconsideration, and, upon reconsideration, the entire Commission denied the application of Herrin to purchase the operating rights of Mobile. It is the latter order which is challenged by this appeal.

Petitioners apparently lay some stress on the Commission's reversal of its prior interim decision upon reconsideration. However, the only question before this court is the validity of the final order, not its inconsistency with a prior rescinded order. *Beard-Laney* v. *United States*, 83 F. Supp. 27, 33; *Lang Transp. Corporation* v. *United States*, 75 F. Supp. 915.

1946. Its subsequent request for authority from the Commission to suspend operations was denied. For approximately one year prior to March 10, 1948, operations were conducted by a lessee of the rights, pursuant to authority granted by the Commission. The lessee ceased operations under the rights on March 10, 1498. Mobile attempted to cancel the lease and to secure authority to suspend operations. On February 18, 1949, the Commission terminated the lease authority and denied authority to suspend operations. Application for Herrin to purchase the rights involved was filed on April 1, 1949. On April 25, 1949, Herrin's application for temporary authority to operate Mobile's rights was denied. Mobile made no effort to resume operations after authority for its suspension of operations and for temporary operation by Herrin was denied. The traffic formerly handled by Mobile was now being handled by other certificated carriers, who had expended funds and energies to handle this business and whose facilities and services were more than adequate to handle all traffic offered.

Herrin in effect proposed to reinstitute service under the dormant rights and would extend its own direct operations beyond their present limits of New Orleans into new territory now adequately served by a number of competing carriers. While a number of shippers indicated a desire for one-line service between Mobile and Texas points, the

Commission found on the evidence before it that there was no showing that existing two-line service was inadequate and that much of the alleged excess in time of two-line service over one-line service was due to delays by Herrin between points on its lines in Texas and New Orleans, and that if those delays were eliminated, existing two-line services would compare favorably as to transit time with the proposed single-line service.

Where a carrier initially seeks a certificate of public convenience and necessity under Section 207(a) of the Act, it must show (1) a need for the service by the shippers in the area, and (2) that existing carriers serving the region will not be unduly prejudiced. *Hudson Transit Lines* v. *United States,* 82 F. Supp. 153, 157, affirmed 338 U.S. 802; *Inland Motor Freight* v. *United States,* 60 F. Supp. 520, 524. While such a showing is not required for approval of a transfer of operating rights under Section 5(a) where the combination of routes involve no more than a continuation of the prior service, cf. *Byers Transp. Co.* v. *United States,* 49 F. Supp. 828, a different rule applies where the rights sought to be acquired are dormant, for operation under such rights would in effect constitute a new service. In such a case the acquiring carrier must make the same showing that he would have to make were he seeking new operating authority under Section 207(a). *Shein Express* v. *United States,* 102 F. Supp. 320, affirmed 343 U.S. 944; cf. *McLean Trucking Co.*

v. *United States,* 63 F. Supp. 829, 831; *Fish Transport Co. Inc. — Purchase — Aiello,* 50 M.C.C. 729, 737; *Hancock Truck Lines—Purchase Anderson,* 55 M.C.C. 115, 120; *Rapid Transportation Co.—Purchase Atlas,* 56 M.C.C. 165, 173; *La Mere and Conroy—Purchase Zeffrin,* 55 M.C.C. 501, 514. Otherwise a carrier could, by purchasing dormant rights of persons no longer operating as carriers, indirectly obtain the same right it would get under a new certificate without having to meet the standards of Section 207(a).

Herrin has made no showing of the need for service in the area covered by the operating rights which it proposes to acquire. It did show that some shippers in the territory now served by it desired one-line service but there was no showing that existing two-line service was inadequate. In addition, the record shows that existing carriers were interchanging a large volume of traffic at New Orleans with Herrin. Furthermore, carriers serving Herrin's present territory interchange traffic at New Orleans with carriers operating in the territory to be served under the dormant rights. Substantially all of this interchange traffic would be lost by the connecting carriers.

In determining where the public interest lay, the Commission had to balance the benefit that might accrue to Herrin's shippers from direct service against the competitive disadvantage to the competing carriers as a group that certification of an additional carrier into the area would

entail. Cf. *Interstate Commerce Commission* v. *Parker,* 326 U.S. 60, 66. The Commission found that the sole consideration in favor of the transaction, the desire of certain shippers and consignees for single line service, did not warrant the revival of dormant operating rights in view of the existing services of numerous carriers and the lack of need for additional services, and that the disadvantages that would result from approval of the transaction outweighed the possible benefits and would not be consistent with the public interest. These determinations fall within the realm of Commission discretion which the courts will not overturn as long as there is a "rational basis" for the Commission's judgment. *Mississippi Valley Barge Line Co.* v. *United States,* 292 U.S. 282, 287. Clearly, the determination of whether the public interest would best be served by granting or refusing the transfer of operating rights under these circumstances is a matter peculiarly within the Commission's expertise. *McLean Trucking Co.* v. *United States,* 321 U.S. 67, 87-88. Contrary to appellants' contention, the decision in *Universal Camera Corp.* v. *National Labor Relations Board,* 340 U.S. 474, does not affect this proposition. See 340 U.S. 474, 488.

2. Appellants contend that the court below failed to comply with Section 10(e) of the Administrative Procedure Act as interpreted by this Court in *Universal Camera Corp.* v. *National*

Labor Relations Board, 340 U.S. 474. They allege that the court did not consider the whole record in determining the validity of the Commission action and that the court abdicated the judicial function when it held that the issue involved was an administrative question peculiarly within the province of the Commission to decide and that the court might not substitute its judgment for that of the Commission.

The detailed opinion of the court below fully refutes the contention that the court did not consider the record as a whole. Two examiners, each after a separate hearing over which they presided, recommended that the application be denied. Appellants would substitute the preliminary judgment of one of the Commission's divisions for the considered judgment of the Commission on reconsideration—a judgment fully supported by the evidence of record as a whole. Here the problem was not one of weighing testimonial conflicts; the problem for the Commission was the balancing of competing economic interests. Cf. *American Trucking Association* v. *United States,* 326 U.S. 77, 86. The function of the reviewing court is "limited to ascertaining whether there is warrant in the law and facts for what the Commission has done." *United States* v. *Pierce Auto Freight Lines,* 327 U.S. 515, 536. Here the court below did find, and properly so, that there was warrant in law and in fact for what the Commission did.

Appellants object to the refusal of the court below to substitute its judgment for that of the Commission. There is no merit to this contention, and this objection presents no issue warranting review of this court. Cf. *Universal Camera Corp.* v. *National Labor Relations Board,* 340 U.S. 474, 488.

CONCLUSION

For the foregoing reasons, it is evident that this appeal presents no substantial questions. It is therefore respectfully submitted that the judgment of the district court should be affirmed.

ROBERT L. STERN
Acting Solicitor General

EDWARD M. REIDY
Chief Counsel
Interstate Commerce Commission

October 1952.

Certificate of Service

I certify that the foregoing Motion to Affirm was served upon counsel for the parties in the case of *Herrin Transportation Co., et al.* v. *United States of America, et al.,* Civil Action No. 3257, United States District Court for the Eastern District of Louisiana by mailing a true copy of said Motion to Affirm to such counsel this twenty-eighth day of October, 1952.

FRANK F. VESPER

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 503

HERRIN TRANSPORTATION CO., INC., MOBILE EXPRESS, INC., AND ROBERT T. HERRIN,
Appellants,

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA

INTERVENERS' MOTION TO AFFIRM

ROBERT L. GARRETT,
ALLAN WATKINS,
DUDLEY W. CONNER,
Counsel for Interveners.

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IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA.

Civil Action No. 3257

HERRIN TRANSPORTATION CO., INC., MOBILE EXPRESS, INC., AND ROBERT T. HERRIN,

Plaintiffs,

vs.

UNITED STATES OF AMERICA, AND THE INTERSTATE COMMERCE COMMISSION,

Defendants

MOTION TO AFFIRM

Now come Atlanta-New Orleans Motor Freight Company, Inc., a Georgia corporation domiciled at Atlanta, Georgia, Couch Motor Lines, Inc., a Louisiana corporation domiciled at Shreveport, Louisiana, Geo. H. Blewett, Leonard W. Harper and Marion L. Martin, a partnership, doing business as T. S. C. Motor Freight Lines of Houston, Texas, T. S. C. Motor Freight Lines, Inc., a Louisiana corporation domiciled at New Orleans, Louisiana, D. C. Hall Transports, Inc., a Delaware Corporation with its principal office at Shreveport, Louisiana, West Brothers, Inc., a Mississippi corporation domiciled at Hattiesburg, Mississippi, and Spanish-Trail Transports, Inc., an Alabama corporation domiciled at Mobile, Alabama, interveners, pursuant to Rule 12, paragraph 3, of the Revised Rules of the Supreme Court of the United States, and move that the decree of the District Court be affirmed.

This is a direct appeal from the final decree,[1] entered September 17, 1952, of a specially constituted District Court of three judges, established pursuant to the Urgent Defi-

[1] The District Court also entered findings of fact and conclusions of law, and wrote an opinion.

ciencies Act of October 22, 1913, dismissing appellants' complaint to set aside an order of the Interstate Commerce Commission. An appeal was allowed October 17, 1952, and appeal papers were served on October 22, 1952.

The Commission's order,[2] dated September 27, 1951, denied appellants' application for transfer made under Section 5 (2) (a) and (b) and (c) of the Interstate Commerce Act (49 U. S. C. A. 5). The Commission decided the proposed transfer was not consistent with the public interest, and in making this finding the Commission considered the effect of the proposed transaction upon adequate transportation service to the public,[3] abandonment of operations by the proposed vendor,[4] and the proof of public convenience and necessity.

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[2] The Commission assigned the application for hearing at New Orleans, Louisiana, before Examiner Philip M. Crowley, and such hearing was held May 6, 1949. The Examiner on August 3, 1949, issued his report and recommended order denying the application. Applicants timely filed a petition for re-consideration and, in the alternative, a re-hearing. The basis for the applicants' request for re-hearing was to offer proof of public convenience and necessity in support of their application. Division 4 of the Commission granted the alternative request for further hearing and assigned the re-opened case before Examiner Francis A. Clifford, which hearing began April 11, 1950, at New Orleans and was held for several days. Examiners Clifford and Hobart C. Clough, after this further hearing, issued a report and recommended order recommending denial of the application. Applicants filed timely exceptions to the Examiners' report and recommended order, and on March 7, 1951, Division 4 of the Commission reversed the Examiners' report and authorized the transfer of the certificates. Petition for reconsideration was filed by the interveners and other protesting carriers. The matter then came before the entire Interstate Commerce Commission which reversed its Division 4 and denied the application for transfer.

[3] Section 5(2)(c) Interstate Commerce Act.

[4] Transcon Lines—Purchase—Anderson Motor Service, Inc., 55 M. C. C. 47, and on reconsideration, decided May 18, 1950; Kenosha Auto Transport Corp.—Purchase—Frey and Witt, 55 M. C. C. 76; Maskowitz Motor Transp. Inc.—Purchase—Sackson, 55 M.C.C. 81; LeMere and Conroy—Purchase—Ziffrin Truck Lines, Inc., 55 M. C. C. 501; Fish Transport Co., Inc.— Purchase—Thomas Aiello, 50 M. C. C. 729; Hancock Truck Lines—Purchase—Anderson, 55 M. C. C. 115; and Rapid Transportation Co.—Purchase—Atlas, 56 M. C. C. 165.

The Appellants' Assignment of Errors are so unsubstantial as not to need further argument in this court:

1

The first error assigned by Appellants is that the court erred in holding "The question here is not whether the proposed purchase by Herrin of Mobile's operating rights is consistent with the public interest. That is an administrative question peculiarly within the province of the Commission to decide, and it is not for this Court to substitute its judgment for that of the Commission."

This assignment of error has been so plainly foreclosed by decisions of the Supreme Court and lower courts as to make further argument unnecessary. *Interstate Commerce Commission* v. *Union Pacific Railroad Company,* 222 U. S. 541; *McLean Trucking Co.* v. *United States,* 321 U. S. 67; *O. C. Wiley & Sons* v. *United States,* 85 F. Supp. 542, affirmed per curiam 338 U. S. 902; *Interstate Commerce Commission* v. *Mechling,* 330 U. S. 567, 67 S. Ct. 894; *Chicago R. I. & P. R. Co.* v. *United States,* 284 U. S. 80, 52 S. Ct. 87; *Pennsylvania R. Co.* v. *United States,* 236 U. S. 351, 35 S. Ct. 370.

2

The question raised by this assignment of error is one of administrative finality. *Rochester Telephone Corp.* v. *United States,* 307 U. S. 125, 139; *Interstate Commerce Commission* v. *I. C. Railroad Co.,* 215 U. S. 452, 470; *Interstate Commerce Commission* v. *Northern Pacific R. Co.,* 216 U. S. 538, 542; *Illinois Central R. Co.* v. *Interstate Commerce Commission,* 206 U. S. 441, 445; *United States* v. *Pierce Auto Lines,* 327 U. S. 515. The foregoing authorities conclusively show that the second assignment of error is without merit and not substantial.

3

The third assignment of error is an incorrect conclusion of the appellants and in direct disregard of the District Court's statement in its opinion that it had considered the whole record and the substantiality of the evidence, which we quote as follows:[5]

> "To determine whether the Commission's findings are supported by substantial evidence, the record must be considered as a whole. *Universal Camera Corp. vs. National Relations Board*, 340 U. S. 474, 71 S. Ct. 456. This we have done. To review the evidence here in detail would serve no useful purpose. We think it is sufficient to say that from such examination it is clear that the ultimate finding that the proposed transaction would not be consistent with the public interest has a rational basis in the subsidiary findings which are supported by substantial evidence."

In this assignment of error the appellants rely upon the *Universal Camera Corp.* v. *National Labor Relations Board* case, 340 U. S. 474, 71 S. Ct. 456, wherein the court said that the rule of substantial evidence was still in effect and "no drastic reversal of attitude was intended" by the Administrative Procedure Act; further, "nor was it intended to negative the function of the Labor Board as one of those agencies presumably equipped or informed by experience to deal with a specialized field of knowledge, whose findings within that field carry the authority of an expertness which courts do not possess and therefore must respect. Nor does it mean that even as to matters not requiring expertise a court may displace the Board's choice between two fairly conflicting views, even though the Court would justifiably

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[5] Page 9 of the Opinion of the District Court.

have made a different choice had the matter been before it *de novo*".

The findings complained of in the Fourth Assignment of Error pertain to the facts in regard to which three Examiners and the entire Commission have made findings contrary to the contentions of the appellants. The expertness and experience of the Commission peculiarly fits it for determinations of the questions involved, which the courts recognize as final when supported by substantial evidence.[6] It will be noted in the case at bar that there is no difference between the conclusions of the impartial and experienced examiners, who have observed the witnesses and lived with the case, and the conclusions of the commission as a whole.

The appellants contend the Commission failed to recognize that Mobile Express, Inc., certificates are presently valid and outstanding certificates. The question with which the Commission was concerned was not the validity of the certificates, but whether the proposed transfer of valid certificates was consistent with the public interest.

The record clearly reflects that Mobile Express, Inc., the owner of the certificates, voluntarily ceased operations and on two separate occasions petitioned the Commission for authority to cease operations which petitions were denied, but notwithstanding these denials Mobile Express, Inc., continued its cessation of operations to this date in defiance of the Commission's orders. The Court's attention is invited that dormancy is merely one factor considered in determining the consistency of public interest.

The applicants contend the Commission required them to

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[6] See *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U. S. 474, 71 S. Ct. 456, and other cases cited herein.

tender proof of public convenience and necessity. This is not supported by the record and is an incorrect statement. The appellants requested a further hearing for the purpose of proving public convenience and necessity, and the Commission granted this privilege. They cannot be heard to complain of the granting of their own request, and there was no requirement by the Commission that they prove public convenience and necessity.

5

The fifth error assigned by the appellants is the Court failed to find that the Commission's policy of denying transfer of so-called dormant certificates of public convenience and necessity has no basis or authority in law, and cannot fairly be inferred by an interpretation of the Interstate Commerce Act.

The law authorizing a consideration of dormancy by the Commission in a transfer case is plainly set forth in Section 5 (2) (b) and (c), the pertinent parts of which are as follows:

Section 5 (2) (b) provides in part:

> "Whenever a transaction is proposed under sub-paragraph (a), the carrier or carriers or person seeking authority therefor shall present an application to the Commission, * * *. If the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed transaction is within the scope of sub-paragraph (a) and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction, upon the terms and conditions, and with the modifications, so found to be just and reasonable. * * *".

And Section 5 (2) (c) provides as follows:

> "In passing upon any proposed transaction under the provisions of this paragraph (2), the Commission shall give weight to the following considerations, among others: (1) The effect of the proposed transaction upon adequate transportation service to the public; (2) the effect upon the public interest of the inclusion, or failure to include, other railroads in the territory involved in the proposed transaction; (3) the total fixed charges resulting from the proposed transaction, and (4) the interest of the carrier employees affected".

The Commission in the case at bar stated ([7]):

> "We have repeatedly said that carriers which have expended their funds and energies in developing and maintaining facilities to handle all available traffic are entitled to protection against the purchase of operating rights under which operations have been abandoned, for the institution of a new service in competition with them. Such protection should be afforded not only for the protection of the carriers themselves, but also to promote stability and sound economic conditions in the industry and the rendition of adequate transportation service to the public".

This statement by the Commission follows a long line of similar decisions.

6

The sixth and seventh assignments of error are not true assignments because they lack any specific assignment and merely state the court erred in refusing to reverse the Commission.

It is respectfully submitted that the District Court's con-

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[7] Sheet 5 of the Commission's Decision rendered September 27, 1951.

clusions are correct and should be sustained because this appeal presents no substantial question.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 503

HERRIN TRANSPORTATION COMPANY, INCORPORATED, MOBILE EXPRESS, INCORPORATED, AND ROBERT T. HERRIN,

Appellants,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA

REPLY TO MOTION TO AFFIRM

Appellants, Herrin Transportation Co., Inc., Mobile Express, Inc. and Robert T. Herrin, pursuant to Rule 7, paragraph 3, of the Revised Rules of the Supreme Court of the United States, herewith reply to the Motions to Affirm of appellees and intervenors, and aver that said motions should be overruled and the case be permitted to go to oral argument before the entire Court.

Statement

The jurisdictional statement heretofore filed in this record, as provided by Rule 12 of the Revised Rules of the Supreme Court of the United States, contains an outline of points and issues raised by appellants in the lower court. Jurisdiction of this Court to review the judgment and decree complained of is conferred by statutory provisions [1] relating to direct appeals from decisions of specially constituted three-judge district courts, in suits to set aside, in whole or in part, orders of the Interstate Commerce Commission. The Court has sustained such jurisdiction in a number of cases reviewing judgments of such district courts on direct appeal.[2]

This suit was brought in the District Court under the provisions of Title 28, U. S. C. A., Sections 1336, 1398, 2284 and 2321-2325; Title 49 U. S. C. A., Sections 17 (9) and 305 (g); and Title 5, U. S. C. A., Sections 1001-1009.

The statute involved in this case is the Interstate Commerce Act, and certain provisions thereof.[3]

There are numerous contentions in the motions to affirm filed by appellees and intervenors with which appellants disagree, both as to facts and to law, and which will be discussed.

Facts of the Case

The lower court decided this matter on September 15, 1952 in a written opinion, which is included in this record. The court's judgment was entered on September 17, 1952,

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[1] 28 U. S. Code, Sections 1253 and 2101 (b).

[2] *United States* v. *Capital Transit Co.*, 338 U. S. 286; *United States* v. *Pacific Coast Wholesalers Association*, 338 U.S. 689; *Alabama Great Southern Railroad Company* v. *United States*, 340 U. S. 216; *United States* v. *Lowden*, 308 U. S. 225; *Interstate Commerce Commission* v. *Railway Labor Executives Association*, 315 U. S. 373.

[3] 49 U. S. C. A., Sections 5 (2) (a) (b); Section 312 (a); Sections 306 and 307; and Section 310 a (a) (b).

and on October 17, 1952 petition for appeal was filed by appellants. The appeal was allowed, and citation of appeal was issued and served on all appellees and intervenors.

The Motions to Affirm having been served on appellants on November 3, 1952 by receipt in the mail on that date, appellants herewith reply thereto.

Before the Interstate Commerce Commission, the facts in chronological order were as follows:

By application filed *April 1, 1949*, Herrin Transportation Company of Houston, Texas (Robert T. Herrin, intervenor, owner of 87.2% of the outstanding capital stock thereof), sought authority under the Interstate Commerce Act (Section 5(2) supra) to purchase all of the motor carrier operating rights heretofore issued by the Interstate Commerce Commission to Mobile Express, Inc., of New Orleans, Louisiana. The certificates generally authorized common carrier motor carrier operations of general commodities between New Orleans, Louisiana, and Mobile, Alabama, with certain described off-route and intermediate points.

The certificates involved here had heretofore, with approval of the Interstate Commerce Commission, been leased by Mobile Express, Inc. to one Lewis Bobo, who ceased operations on or about *March 10, 1948* and filed a voluntary petition in bankruptcy on *March 15, 1948*.

On *March 29, 1948*, Mobile Express, Inc. filed a petition with the Interstate Commerce Commission, requesting that it revert the leased operating rights from Bobo to it.

On *May 19, 1948*, counsel for Mobile Express, Inc. forwarded to this Commission the original of an affidavit dated *May 8, 1948*, executed by Lewis Bobo under oath, in which affiant admitted (See original exhibit 12) that "as lessee under the above mentioned contract dated February 17, 1949 he was in arrears in the payment of rent under said lease for the months of December, 1947, January and Feb-

ruary, 1948, and that on or about February 24, 1948 he was notified by Mobile Express, Inc. of the cancellation of said lease contract for non-payment of said rent as provided in said lease contract. That in pursuance to said notification he ceased operations, as above mentioned, on March 10, 1948, and affiant further states that he has no intention of further attempting to operate."

However, on *June 25, 1948*, the Commission denied the petition of Mobile Express, Inc., lessor, seeking cancellation of the Commission's order of April 10, 1947 authorizing the lease between Mobile Express, Inc. and Bobo.

Thereafter, on *July 16, 1948*, Mobile Express, Inc. filed a petition in the United States Court, Mobile, Alabama, seeking an order instructing the Trustee in Bankruptcy that he had no further interest in said lease (R. 56, 82, 83, 84).

On *December 13, 1948*, Mobile Express, Inc. again filed a petition with this Commission in Docket No. MC-FC-31414, seeking a suspension of the operating rights until disposition of the matter pending before the United States Court in Alabama and with the Trustee in Bankruptcy (R. 57).

On *February 18, 1949*, the Commission issued its order (served *March 7, 1949*) denying the petition of Mobile Express, Inc., lessor, for suspension of the operating rights herein, but Division 5 cancelled the lease and reverted same to lessor, Mobile Express, Inc.

Contemporaneously with the application for permanent authority to transfer, the parties likewise filed on *March 21, 1949* an application for temporary authority (pending the application for permanent authority) to lease the operating rights under the provisions of Section 310 a (a) (b) of Title 49 U. S. C. A. The application was denied by the Commission, which found that the failure to grant the authority would not result in destruction or injury to the motor carrier properties sought to be acquired or interfere

substantially with their future usefulness. By failing to grant the temporary authority application, the Commission clearly misinterpreted the provisions of the above Statute.[4]

Thereafter, two separate hearings on the permanent application to transfer were held before trial examiners of the Commission, numerous public witnesses were produced by applicants, and each examiner in turn recommended denial of the applications. Exceptions having been filed on March 27, 1951, *Division 4*[5] *of the Interstate Commerce Commission approved and authorized the purchase and transfer of the certificate, holding that the transaction would be consistent with the public interest.*

Petition for reconsideration to the entire Commission was filed, which reversed its own Division 4 opinion in a 6 to 4 decision of the Comission, denying the application to

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[4] "(a) To enable the provisions of service for which there is an immediate and urgent need to a point or points or within a territory having no carrier service capable of meeting such need, the Commission may, in its discretion and without hearings or other proceedings, grant temporary authority for such service by a common carrier or a contract carrier by motor vehicle, as the case may be. Such temporary authority, unless suspended or revoked for good cause, shall be valid for such time as the Commission shall specify, but for not more than an aggregate of one hundred and eighty days, and shall create no presumption that corresponding permanent authority will be granted thereafter.

"(b) Pending the determination of an application filed with the Commission for approval of a consolidation or merger of the properties of two or more motor carriers, or of a purchase, lease, or contract to operate the properties of one or more motor carriers, the Commission may, in its discretion, and without hearings or other proceedings, grant temporary approval, for a period not exceeding one hundred and eighty days, of the operation of the motor carrier properties sought to be acquired by the person proposing in such pending application to acquire such properties, *if it shall appear that failure to grant such temporary approval may result in destruction of or injury to such motor carrier properties sought to be acquired, or to interfere substantially with their future usefulness in the performance of adequate and continuous service to the public.*" (Emphasis ours).

[5] The Interstate Commerce Commission separates its work into divisions; Division 4, composed of three members of the Commission, is chiefly concerned with hearing and deciding cases involving transfer of certificates.

transfer (Commissioners Lee, Mahaffie, Rogers and Cross dissenting).

It was from this action that appeal was taken (under the provisions of law heretofore referred to) to the three-judge district court.

The district court rendered its opinion through one of its members, holding substantially that the question of the proposed purchase and transfer of the certificates of public convenience and necessity involved here is an administrative question peculiarly within the province of the Commission to decide and not for the court to substitute its judgment for that of the Commission; that the order of the Commission denying the transfer of the certificates lay within the scope of the Interstate Commerce Act, and, having been based upon adequate findings supported by substantial evidence, the order is entitled to finality and may not be set aside, modified or disturbed by this Court.

With this legal conclusion appellants disagree.

The Issues Involved Here

1. Shall the Court exercise its right and duty of judicial review of this case, or shall it abdicate the judicial function in favor of the so-called expertness of the Commission when deciding an administrative question?

2. Shall the Court give effect to the principle in *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U. S. 474, 71 Sup. Ct. 456, or shall it decline to substitute its judgment for that of the Commission allegedly supported by substantial evidence, where the evidence reviewed on the whole record precludes the Commission's decision from being justified by a fair estimate of its worth?

3. The issue is substantial.

Argument

1. As pointed out in the Assignment of Errors which appellants filed herein, the Court below concluded that,

> "The question here is not whether the proposed purchase by Herrin of Mobile's operating rights is consistent with the public interest. That is an administrative question peculiarly within the province of the Commission to decide, and *it is not for this Court to substitute its judgment for that of the Commission.*" (Emphasis ours.)

The practical effect of this conclusion is to abdicate the judical function and to surrender and abandon the power and authority of the Court to review an administrative board's decision. If under the guise of the issue involved in the case being a so-called "administrative question" which is peculiarly within the province of the Commission to decide, the Court states it will not substitute its judgment for that of the Commission, the right granted by law to review the decisions of administrative boards and tribunals has been entirely lost. The lower court, therefore, grievously erred in this conclusion.

The matter of obtaining approval of transfer of a motor carrier certificate of public convenience and necessity has been delegated to the Interstate Commerce Commission. But Congress also has passed laws under which this suit was brought which authorize judicial review of such decisions. The matter is peculiarly one for the Commission to decide, but certainly it was never intended that the Commission should have the final say. If this be true, the statute permitting judicial review is a vain and hollow thing. It is a whitened sepulchre which attracts the aggrieved party but when attained affords him no refuge.

The misconception of the law and jurisprudence by the lower court is sufficient alone, in our opinion, to justify

reversal of the decision. If the lower court felt that it had no right to substitute its judgment in matters involving proposed transfer of certificates of motor carrier operating rights, why should it entertain the suit at all? It should simply have said that it does not judicially review administrative questions because it may not substitute its judgment for that of a board where it has decided an administrative question peculiarly within its province to decide.

2. The Court below cited *Universal Camera Corp.* v. *National Labor Relations Board, supra,* but it gave no effect to it. The cited case imposes a responsibility on the Court to exercise fully the function of judicial review of administrative action by consideration of all the facts and circumstances in a review of the *whole record.*

The District Court said in its opinion that if the order of the Interstate Commerce Commission here complained of is based upon adequate findings supported by substantial evidence the order is entitled to finality and may not be set aside by this Court. Then, the Court said, in an apparent effort to fit its decision within the principles of *Universal Camera Corp., supra,* that it had considered the record as a whole. But it said, "To review the evidence here in detail would serve no useful purpose." Further, it said, "The weighing of the evidence is a function reposed by the Act *in the Commission.*" (Emphasis ours.)

It is significant that there has been no review of the evidence whatsoever by the lower court; the Court states no useful purpose can be served thereby. Apparently what the Court meant was that since the matter involved an administrative question which the Interstate Commerce Commission had determined, the Court might not substitute its judgment no matter how one-sided the facts were in favor of appellants. If the Court did not mean this when it later said that the Commission's decision was based upon ade-

quate findings supported by substantial evidence, what are we to conclude it meant by the term "substantial evidence"? It does not say what the substantial evidence is upon which the decision is predicated. It is apparent that what the Court did was to determine if there were sufficient facts *prima facie* to justify the Commission's decisions, and, believing there were and that the order "is entitled to finality and may not be set aside," denied appellants' appeal from this wholly wrong decision. It did not give consideration to the great volume of evidence which equitably supports appellants' position that the transfer of certificates should have been authorized by the Commission.

Of course, the only fair way to determine what the District Court said is to read its opinion as a whole without isolating excerpts therefrom. But when this is done the conclusion is inescapable that the court did not follow the principle enunciated by the Supreme Court of the United States in *Universal Camera Corp., supra,* but based its opinion on other precedents, which have been modified by *Universal Camera Corp., supra.*

Universal Camera Corp., supra, is a modification of the right of judicial review of administrative decisions. It cannot be read in any other light.

The test under the Administrative Procedure Act [6] is that the Court must review the *whole record* and not view it in isolation or one-sidedly in order to ascertain if there is substantial evidence to support the conclusion of the Board or Commission.

The Court said further (p. 464):

> "From the legislative story we have summarized, two concrete conclusions do emerge. One is the identity of aim of the Administrative Procedure Act and the Taft-Hartley Act regarding the proof with which the

[6] 5 U.S.C.A., Section 1009.

Labor Board must support a decision. The other is that now Congress has left no room for doubt as to the kind of scrutiny which a court of appeals must give the record before the Board to satisfy itself that the Board's order rests on adequate proof."

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"Whether or not it was ever permissible for courts to determine the substantiality of evidence supporting a Labor Board decision merely on the basis of evidence which in and of itself justified it, without taking into account contradictory evidence or evidence from which conflicting inferences could be drawn, the new legislation definitely precludes such a theory of review and bars its practice. The substantiality of evidence must take into account whatever in the record fairly detracts from its weight. This is clearly the significance of the requirement in both statutes that courts consider the whole record. Committee reports and the adoption in the Administrative Procedure Act of the minority views of the Attorney General's Committee demonstrates that to enjoin such a duty on the reviewing court was one of the important purposes of the movement which eventuated in that enactment." Reading again from the cited case, the Court said, (p. 465): *"Congress has merely made it clear that a reviewing court is not barred from setting aside a Board decision when it cannot conscientiously find that the evidence supporting that decision is substantial, when viewed in the light that the record in its entirety furnishes, including the body of evidence opposed to the Board's view."* (Emphasis ours.)

"A formula for judicial review of administrative action may afford grounds for certitude but cannot assure certainty of application. Some scope for judicial discretion in applying the formula can be avoided only by falsifying the actual process of judging or by using the formula as an instrument of futile casuistry."

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"Since the precise way in which courts interfere with agency findings cannot be imprisoned within any form of words, new formulas attempting to rephrase the old are not likely to be more helpful than the old. There are no talismanic words that can avoid the process of judgment. The difficulty is that we cannot escape, in relation to this problem, the use of undefined defining terms."

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"But a standard leaving an unavoidable margin for individual judgment does not leave the judicial judgment at large even though the phrasing of the standard does not wholly fence it in. The legislative history of these Acts demonstrates a purpose to impose on courts a responsibility which has not always been recognized." (Emphasis ours).

On page 466 of the Reporter, the Court concludes with the following important language:

"We conclude, therefore, that the Administrative Procedure Act and the Taft-Hartley Act direct that courts must now assume more responsibility for the reasonableness and fairness of Labor Board decisions than some courts have shown in the past. Reviewing courts must be influenced by a feeling that they are not to abdicate the conventional judicial function. Congress has imposed on them responsibility for assuring that the Board keeps within reasonable grounds. That responsibility is not less real because it is limited to enforcing the requirement that evidence appear substantial when viewed, on the record as a whole, by courts invested with the authority and enjoying the prestige of the Courts of Appeals. The Board's findings are entitled to respect; but they must nonetheless be set aside when the record before a Court of Appeals clearly precludes the Board's decision from being justified by a fair estimate of the worth of the testimony of witnesses or its informed judgment on matters within its special competence or both." (Emphasis ours).

Parker, in his treatise on Administrative Law,[7] summarized the rule and the function of judicial review in the following excerpt from his work:

> "Closely related, and yet not quite the same, is the theory of recent times whereby the courts will not review agency holdings on questions whose solution depends on, or lies within the peculiar province of, the agency's expertness. Yet the importance of this doctrine must not be overrated. In the Hearst case, for example, the Court clearly rests not only on the agency's interpretation of the law but also on the Court's approval of the interpretation. On close reading we can say the same of every one of the opinions in which the courts appear to refrain from reviewing an agency's expert holding. There is no case where the court says, 'While we disagree with the agency's holding, still it falls within the agency's province of expert knowledge of law and fact and so we follow it.' Quite to the contrary, the courts have freely rejected the Dobson and Hearst doctrine whenever they failed to agree with an agency's interpretation, based on expertness though it may have been. As for the future, it may be borne in mind that the agency-expertness doctrine is in part based on the idea that the peculiar 'administrative' question under consideration (as whether newsboys are employees are 'mixed' questions, i.e., partly of fact rather than only of law, and that under the substantial evidence rule the courts do not usually disturb agency fact findings. *Now, the substantial evidence rule has been diminished*—not very much it is true, but maybe just enough to furnish some impetus for moving away from the deference-to-agency-holdings-on-legal questions doctrine."[8] (Emphasis ours.)

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[7] 1952—Bobbs-Merrill Co., publishers.

[8] Citing *Universal Camera Corp.*, supra.

Consideration of the Record as a Whole

Practically all of the public testimony favored approval of the transaction; at least, the evidence overwhelmingly preponderated in favor thereof.

There were 20 shippers and consignees of freight and 3 of vendee's connecting motor line carriers testifying in support of the application. Undeniably, there are undoubted benefits to the public which would result from the approval of the transaction. Exclusive single-line service would be rendered between many points not now favored by such service. There is no direct service from New Orleans to many off-route points (off U. S. 90) such as Logtown, Waveland, Clermont Harbor, Lakeshore, Kiln, Pine Hill, Fenton, Delisle and Handsboro, Mississippi.

It is argued that a strong carrier is purchasing the operations of a weak one which will enhance the competitive effect.

The Commission has heretofore rejected the contention that it is not consistent with the public interest to permit a strong carrier, such as vendee, to take over the operations of a carrier whose operations were not as substantial as those proposed will be.

In *Merchants Motor Freight, Inc.—Purchase—Leman*, 37 M. C. C. 211, 214, the contention made in the proposed report relative to a strong carrier was rejected by Division 4:

> "They further contend, and offered evidence in an effort to show, that service, presently afforded in the territory is adequate, and that increase in competition resulting from unification of the operations in Motor Freight, *a relatively strong carrier*, would seriously affect their earnings. At least two of the protestants conduct operations in the territory of Motor Freight and the partnership, and there are other carriers providing service by interchange arrangements. We are

> not convinced, on the evidence adduced, that traffic available in the considered territory is insufficient to support the additional competition which Motor Freight would provide, *considering the superior service to be rendered the shipping public.*" (Emphasis ours).[9]

We are astonished to read in the Commission's motion to affirm (pages 6 and 7) that where the rights sought to be acquired are dormant, the acquiring carrier must make the same showing that he would have to make were he seeking new authority under Section 207(a) of the Act. If this be true no dormant certificate can ever be transferred by the Commission. The same showing would have to be made of public convenience and necessity which is required in filing new applications for authority. If the Commission can do this it has the power to rewrite the Act of Congress. For there is nothing in the Act which would justify the Commission in declining to transfer a so-called dormant certificate. We know of the Commission's decisions and precedents which require proof of public convenience and necessity to go along with a proposed transfer of dormant certificates. We have never agreed that the Commission had authority to make such requirements, but we complied in this case despite our belief that the Commission had no right to require such a proof. Appellants thought, as do most of the practitioners before the Commission, that a lesser degree of proof was required by the Commission in such matters as would be in the filing of a brand new public convenience and necessity application. Otherwise, why go

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[9] Best Motor Lines—Purchase—Highway M. Frt. Lines, Inc., 38 M. C. C. 199; Bigge Drayage Co.—Purchase—Fitinghoff, 38 M. C. C. 633, 637; Super Service M. Freight Co., Inc.—Purchase—Selman, 45 M. C. C. 432; Farmer Purchase—Crouse, 45 M.C.C. 267; Brown Express—Purchase—Jones Motor Freight Lines, 55 M. C. C. 127; Shapiro—Purchase—Kasen, 7 F. C. C., 31,819; Auclair—Purchase—Moore, 7 F. C. C., 31,833; Associated Transported, Inc.—Control and Consolidation, 40 M. C. C. 59.

to the trouble of attempting to transfer a so-called dormant certificate and why pay money for such a certificate if having one doesn't mean anything? It would be more simple to file an application under the public convenience and necessity provisions of the Act and forget about the so-called dormant certificate. The Commission cannot justify the interpretation it has placed on the Act in this and other cases. *So far as we have been able to determine, this issue of law has never been passed on by the Supreme Court.*

The Act states in part that,

> *"Certificates, permits and licenses shall be effective from the date specified therein, and shall remain in effect until suspended or terminated as herein provided."* [10] (Emphasis ours.)

The certificates involved in the present transaction owned by Mobile Express, Inc. are still outstanding, valid certificates issued by the Interstate Commerce Commission. They have neither been suspended or terminated. They exist as fully today as they did when first issued.

The Commission has vacillated from time to time on this issue itself.

In the late case of *Strickland Transp. Co., Inc.—Purchase—Gordon Interstate, Inc.*, 50 M.C.C. 79, 83, 84, decided October 6, 1947, Division 4 held:

> "Notwithstanding nonoperation thereunder since January 1946, vendor's certificates are in full force and effect, and may be acquired by vendee, if we find that the transaction is consistent with the public interest. Smith Bros. Revocation of Certificate, 33 M.C.C. 465, 472; Quaker City Bus Co.—Purchase—Blackhawk Line, Inc., 38 M.C.C. 603.
>
> "We see no valid reason for withholding action herein awaiting determination of the complaints. Even

[10] Title 49 U. S. C. A., Section 312 (a).

if the complainants establish their allegations, under the provisions of section 212(a), before the certificates may be revoked, the holder thereof must be given an opportunity to comply with an order commanding obedience to the provisions of the act, or regulations issued thereunder, or a condition of the certificate found to have been violated. *Obviously, vendee is in better position to resume the considered operations than is vendor, and approval and consummation of the transaction here proposed would tend to cure the very condition which is the basis of the complaints.* On the other hand, if action here were delayed pending final action on the complaints, the Commission would be placed in the anomalous position of hindering the resumption of operations and, provided the relief prayed for in the complaints is granted, hindering compliance with its own order requiring such resumption."

In *Powell Bros. Truck Lines, Inc.—Purchase—Bryan*, 39 M.C.C. 11, 16, in the report of the Commission on reconsideration, the entire Commission held:

"The findings in the reports cited by the court, to the extent they involved the transfer of rights under certificates, are contrary to our later findings in Quaker City Bus Co.—Purchase—Blackhawk Line, Inc., 38 M.C.C. 603, hereinafter called the Quaker City case, wherein *we found that a lack of operation by a holder of a certificate does not nullify the certificate, nor does the mere fact that there is an interruption in operations automatically revoke a certificate.* In our report in the Quaker City case, we concluded that, to accomplish a revocation of a certificate, the provisions of section 212 (a) must be satisfied. That section provides that a certificate shall remain in effect until terminated as therein provided. One of the requirements preliminary to revocation of a certificate is that there shall be notice and hearing. See also Smith Bros. Revocation of Certificate, 33 M.C.C. 465." (Emphasis ours.)

In *Wells Truckways, Ltd.—Purchase—Colorado—Arizona Express, Inc.*, 5 F.C.C., paragraph 31,189.01, Division 4 said:

> "The reason for the abandonment of operations would have no effect on the jurisdictional principle set forth in the Blackhawk case. That is to say, jurisdiction attaches to a transaction under section 5 by virtue of the possession of a certificate issued by this Commission whether or not there are operations thereunder. The question presented is whether purchase of the operating rights under such dormant certificate would be consistent with the public interest. *We have frequently authorized the acquisition of long-dormant operating rights as consistent with the public interest subsequent to the Blackhawk case.*" (Emphasis ours.)

The record is so clear that appellants have done everything within their power to cause a resumption of service over the proposed routes and certificates involved, that the contention of dormancy could never be properly made in this case. Appellants tried for over a year to get the Interstate Commerce Commission to revert the operating rights from lessee, Bobo, to the owner, Mobile Express. When finally the Commission did do so, a prompt application was filed to transfer the certificates to Herrin, vendee, and an application was also filed for temporary authority under the provisions of the Act to authorize Herrin to begin immediate operations and prevent dormancy. The Commission, though the Act provided that it could do so, did not authorize temporary authority. It is idle to say that Mobile Express should have resumed operations. It had no trucks (which the record discloses, with the reasons why). Its sole property was its certificates which it had sold to Herrin subject to the Commission's approval. *The obstructions, the delays, the misinterpretations of the Act were committed by the Interstate Commerce Commission.* These appellants,

availing themselves of the provisions of law, are appealing to the courts for help to reverse an adverse, wrong decision. If courts are without power and authority to do so or if they are unwilling to exercise the authority, these appellants have had their final say *when they were before the Commission.* But we do not believe our highest court will fail to give renewed vigor to *Universal Camera Corp., supra,* consider the entire record, and reverse the Interstate Commerce Commission decision.

Conclusion

The issues are, therefore, substantial. They involve the failure of the District Court either to understand or apply the principle in *Universal Camera Corp.* v. *National Labor Relations Board, supra.* Likewise, the Interstate Commerce Commission has made interpretations of the Interstate Commerce Act which are not justified in law, and on the whole record it has misapplied even its own test in a decision apparently much controverted even within the Commission itself, *since the Commission's own Division 4 voted to grant the application which was only reversed by a six-to-four decision of the Commission itself.*

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